

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



# 76-4165

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

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STATE INSURANCE FUND  
AND GUARDINO & SONS,

*Petitioners*

v.

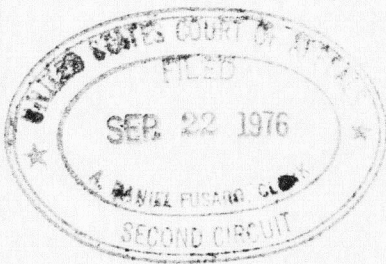
CATHERINE PESCE,

*Respondent.*

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**APPENDIX**

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**Petition for Review.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

76-4165

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STATE INSURANCE FUND  
AND GUARDINO & SONS,

Petitioners

v.

CATHERINE PESCE,

Respondent.

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The State Insurance Fund and Guardino and Sons hereby petition the Court for review of the Order of the Benefits Review Board, United States Department of Labor, filed on May 28, 1976, which affirmed a decision and order of Administrative Law Judge Oliver which held that the amendments to the Longshoremens and Harbor Workers Act as amended, 33 U.S.C. 3901 et seq. are applicable to pre-amendment injuries and claims arising therefrom.

Dated: June 25, 1976.

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**Benefits Review Board, BRB No. 75-303, Decision.**

U.S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD  
Washington, D.C. 20210

FILED AS PART OF THE RECORD  
May 28, 1976

SUSAN RAMBO  
(Clerk)

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CATHERINE PESCE (Widow of MATTEO PESCE)  
Claimant-Respondent

v.

GUARDINO AND SONS  
and

STATE INSURANCE FUND  
Employer/Carrier Petitioners

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Appeal from the Decision and Order of Garvin Lee Oliver, Administrative Law Judge, United States Department of Labor.

Joseph F. Manes (Minore and Manes), New York City, New York, for the employer/carrier.

Before: Washington, Chairperson, Hartman and Miller, Members.

Hartman, Member:

This is an appeal from the Decision and Order (75-LHCA-313) of Administrative Law Judge Garvin Lee Oliver pursuant to the provisions of the Longshoremen's

*Benefits Review Board, BRB No. 75-303, Decision.*

and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

On July 20, 1961, Matteo Pesce, the decedent, injured his back while in the course of employment with Guardino and Sons (employer). Decedent never returned to gainful employment and was awarded compensation for permanent total disability to be paid by employer. Employer paid all benefits due decedent until the date of decedent's death.

Decedent died on October 14, 1973, of causes unrelated to the injury sustained by him in the course of his employment. It is not disputed that claimant is a "widow" within the meaning of the Act. 33 U.S.C. § 902(16).

The administrative law judge awarded claimant death benefits, funeral expenses, and attorney fees. The employer appeals contending that claimant is not entitled to death benefits; that if claimant is entitled to death benefits then employer is entitled to contribution from the Special Fund; that if claimant is entitled to death benefits then the Special Fund is responsible for future annual adjustments pursuant to § 10(h)(3) of the Act, 33 U.S.C. § 910(h)(3); and that § 10(h) is unconstitutional.

Employer's basic contention is that it should not be required to pay death benefits to claimant pursuant to Section 9 of the Act, 33 U.S.C. § 909. Prior to the 1972 amendments to the Act, death benefits were not provided where a permanently and totally disabled employee died of causes unrelated to his disability. The decedent sustained his disability prior to the 1972 amendments; however, he died after the effective date of the 1972 amendments to the Act. Employer's appeal rests on the belief that where decedent's disability was sustained before Section 9 of the Act was amended, it cannot be held responsible for payment of death benefits if the cause of decedent's death was unrelated to his disabling injury.

*Benefits Review Board, BRB No. 75-303, Decision.*

Section 9 of the Act states:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following . . . (1972 amendments emphasized).

Employer's argument that the 1972 amendments cannot create death benefits not in existence when the employee was disabled has been raised previously before this Board. *Egger v. Willamette Iron & Steel Company*, 2 BRBS 247, BRB No. 75-154 (Sept. 3, 1975); *Rouse v. Norfolk, Baltimore and Carolina Lines, Inc.*, 2 BRBS 11, BRB No. 75-101 (June 20, 1975). We stated in *Rouse*: "The right to death benefits is a right which arises at the time the injured employee dies, and the law governing the question of whether death benefits are payable is the law in effect when the right arises." 2 BRBS at 14. Accordingly, we hold that employer is required to pay death benefits to the claimant pursuant to Section 9 of the Act.

Employer's argument that the Special Fund should pay or contribute to the death benefits is also without merit. "Section 44(j) of the Act, 33 U.S.C. § 944(j), expressly provides the purposes for which the Special Fund is to be used. There is no statutory authority allowing the Special Fund to pay benefits due pursuant to Section 9 of the Act." *Rouse, supra* at 16.

Finally, employer has raised issues concerning the application of Section 10(h) of the Act, 33 U.S.C. § 910(h). Since the administrative law judge ruled that claimant's death benefits are not subject to the annual adjustments under either Sections 10(f) or 10(h)(3) of the Act, these

*Benefits Review Board, BRB No. 75-303, Decision.*

issues need not be discussed. We note, however, that the Board held in *Egger* that where the decedent's death was unrelated to his disabling injury, the death benefits were not subject to the annual adjustments under either Sections 10(f) or 10(h)(3) of the Act.

Accordingly, the Decision and Order of the Administrative law judge is affirmed.

We Concur:

RALPH M. HARTMAN

Ralph M. Hartman, Member

RUTH V. WASHINGTON

Ruth V. Washington, Chairperson

JULIUS MILLER

Julius Miller, Member

Dated this 28th day  
of May, 1976

**Agreed Statement of Fact.**

**UNITED STATES DEPARTMENT OF LABOR**

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

**WASHINGTON, D.C., 20210**

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**[S A M E T I T L E]**

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Decedent injured his back on July 20, 1961. He never returned to gainful employment. A compensation order dated February 2, 1972 was issued on the basis of a Permanent Total disability for the period 7-15-61 to 1-28-72 at \$70.00. An additional order was issued on June 2, 1972 directing payments of benefits to the decedent (then alive) from 1-29-72 to 2-25-72 at \$70.00.

Payments were thereafter made to the decedent until 10-14-73, the date of death.

On December 6, 1973 Claims Examiner Buckberg noted the decedent's demise and directed payments to the widow, Catherine Pesce from 10-14-73 at the rate of \$70.18 equaling 50% of the national weekly wage, of \$140.36 per Section 9 of the Act. An order was issued to that effect which order also determined that this was an automatic death case.

BEC 207 was filed in conjunction with this order and the Employer and Carrier contended that Section 9, 10F and 10G of the Act should not be applied.

Thereafter on June 20, 1974 after a Pre-trial Conference a similar order directing a continuance of payments at the rate of \$70.18 and a funeral benefit of \$1,000.00 to the widow.

*Agreed Statement of Fact.*

BEC 207 was filed in conjunction therewith on June 26, 1974.

The date of death, the widow's status and her relationship to the decedent were not contested.

The only issue is whether the Act as amended applies to the Instant Claim since this accident occurred in July 14, 1961.

PAUL GRITZ  
Attorney for Claimant

JOSEPH F. MANES for  
Herbert Lasky  
General Attorney  
State Insurance Fund  
Attorney for Employer  
and  
Carrier

**Decision and Order.**

**U.S. DEPARTMENT OF LABOR**

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

Suite 700-1111 20th Street, N.W.  
Washington, D.C. 20036

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[S A M E T I T L E]

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Linda L. Carroll, Esquire  
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Marshall H. Harris, Associate Solicitor)  
United States Department of Labor  
Washington, D.C. 20210  
For the Director, Office of Workers'  
Compensation Programs

Before: GARVIN LEE OLIVER  
Administrative Law Judge

*Decision and Order.**Statement of the Case*

This proceeding involves a claim for death benefits pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, (Supp. III, 1973), hereinafter referred to as the Act. The case was referred to the Office of Administrative Law Judges for formal hearing and decision as is provided by § 19(d) of the Act and the Rules and Regulations implementing said Act, 20 C.F.R. Parts 701 and 702.

At a pre-hearing conference held on March 18, 1975, the Claimant and the Employer and Carrier agreed that the only issues in dispute were questions of law and requested leave to submit an agreed statement of facts upon which a decision could be rendered. Counsel for Claimant filed the Agreed Statement of Fact on August 18, 1975, which has been made part of the record. All parties have filed briefs which have been duly considered.

*Issues*

The issues presented for determination are (1) whether the Claimant, Catherine Pesce, the widow of Matteo Pesce, decedent, is entitled to death benefits under the provisions of § 9 of the Act as amended by the 1972 amendments to the Act, (2) if § 9 is applicable, whether the Employer and Carrier are liable for the death benefits, or are entitled to contribution from the Special Fund supported by § 44 of the Act; (3) whether the Claimant is entitled to future annual adjustments pursuant to § 10(h)(3) of the Act, payable from the Special Fund, and (4) if portions of § 10(h) are applicable, whether § 10(h) is unconstitutional.

Based upon the entire record in this case, including the stipulations of fact by the parties, I make the following Findings of Fact, Conclusions of Law, and Order.

*Decision and Order.**Findings of Fact*

Counsel for the Clairant and counsel for the Employer and Carrier have stipulated the following with respect to claim, and it is so found:

Decedent injured his back on July 20, 1961. He never returned to gainful employment. A compensation order dated February 2, 1972 was issued on the basis of a Permanent Total disability for the period 7-15-61 to 1-28-72 at \$70.00.

An additional order was issued on June 2, 1972 directing payments of benefits to the decedent (then alive) from 1-29-72 to 2-25-72 at \$70.00.

Payments were thereafter made to the decedent until 10-14-73, the date of death.

On December 6, 1973 Claims Examiner Buckberg noted the decedent's demise and directed payments to the widow, Catherine Pesce from 10-14-73 at the rate of \$70.18 equalling 50% of the national average weekly wage, of \$140.36 per Section 9 of the Act. An order was issued to that effect which order also determined that this was an automatic death case.

BEC 207 was filed in conjunction with this order and the Employer and Carrier contended that Sections 9, (10(f) and 10(g) of the Act should not be applied.

Thereafter on June 20, 1974 after a Pre-trial Conference a similar order [issued] directing a continuance of payments at the rate of \$70.18 and a funeral benefit of \$1,000.00 to the widow.

BEC 207 was filed in conjunction therewith on June 26, 1974.

*Decision and Order.*

The date of death, the widow's status and her relationship to the decedent were not contested.

The only issue is whether the Act as amended applies to the instant claim since this accident occurred on July 14, 1961. (Agreed Statement of Fact).

It is not disputed that the decedent's death was unrelated to his compensable injury. (Brief for Claimant, pp. 3-4; Post Trial Memorandum for Employer and Carrier, pp. 1-2; Memorandum of Director, Office of Workers' Compensation Programs, p. 2).

*Conclusions of Law*

The Benefits Review Board recently rendered two decisions which deal precisely with the same issues as are in this case. These decisions, *Marianne Egger (widow of Hans W. Egger) v. Willamette Iron & Steel Company*, BRB No. 74-154 (September 3, 1975) and *Lee Rouse (Deceased) v. Norfolk, Baltimore and Carolina Lines, Inc.*, BRB No. 75-101 (June 20, 1975), hold that where a decedent's injury occurred prior to the effective date of the 1972 Amendments, and decedent was permanently and totally disabled at the time of death due to such injury, and death occurred after the effective date of the 1972 Amendments from causes unrelated to his work related injury, the widow is entitled to death benefits pursuant to Section 9 of the amended Act. The Board found that application of amended Section 9 in such circumstances is not unconstitutional.

The Board also held in *Rouse* that § 44(j) of the Act, 33 U.S.C. § 944(j), expressly provides the purposes for which the Special Fund is to be used, and there is no statutory authority allowing the Special Fund to pay benefits due pursuant to Section 9 of the Act.

*Decision and Order.*

The Board held in *Egger* that where the decedent's death was unrelated to his work related injury, the weekly compensation benefits were not subject to the annual adjustments under either § 10(f) or § 10(h)(3) of the Act, since the "clear language of both sections limits annual adjustments of death benefits to those cases where the injury resulted in death." In this case, it is not disputed that decedent's death was unrelated to his work related injury.

I am bound by the Board's decisions in *Egger* and *Rouse*, and reach the same conclusions as set forth above on the issues in this case, except to note that, as regards the constitutional issue, final jurisdiction to pass on the constitutionality of an act of Congress is a prerogative of the judicial branch of Government if judicial review is sought. See *Knowles v. Hirsch*, 65 F. Supp. 690 (D. D.C. 1946); *Dubois Clubs v. Clark*, 389 U.S. 309, 88 S. Ct. 450 (1967); *Irey v. Hodgson*, 354 F. Supp. 20 (N.D. W. Va. 1972), *aff'd mem.*, 409 U.S. 1070, 93 S. Ct. 682 (1972); *Wallace v. Lynn*, 507 F. 2d 1186 (D.C. Cir. 1974).

Claimant's attorney, Paul Gritz, Esquire, is entitled to receive from the Employer and Carrier the sum of \$1,187.50 which I find to be the reasonable value of legal services rendered the Claimant herein pursuant to 20 C.F.R. § 702.132 and 33 U.S.C. § 928.

Based upon the foregoing Findings of Fact and Conclusions of Law, I make the following:

COMPENSATION ORDER

1. The Employer and Carrier shall pay compensation to the Claimant, subject to the provisions of § 9 of the Act, 33 U.S.C. § 909, during her widowhood, at the weekly rate of \$70.18, based upon a weekly rate of fifty percent of the applicable national average weekly wage of \$140.36, pay-

*Decision and Order.*

able in bi-weekly installments beginning as of October 14, 1973. *Rasmussen v. Geo. Control, Inc.*, BRB Nos. 74-204 and 74-204A (April 3, 1975).

2. All compensation installments due and unpaid to the date of this Order shall be paid forthwith in a lump sum, and shall bear interest at the rate of six percent per annum from the date each installment was due until finally paid.

3. The Employer and Carrier shall pay, or reimburse the Claimant for reasonable funeral expenses not exceeding \$1,000.00.

4. The Employer and Carrier shall pay directly to Paul Gritz, Esquire, the sum of \$1,187.50 for legal services rendered the Claimant.

GARVIN LEE OLIVER  
Garvin Lee Oliver  
Administrative Law Judge

Dated: October 21, 1975  
Washington, D. C.